ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ALLEN HAMPTON,

Respondent.

CASE NO. 89,055

PETITIONER'S INITIAL BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

GISELLE LYLEN RIVERA
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0508012

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA STATUTES

OTHER

PRELIMINARY STATEMENT

The Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Allen Hampton, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The historical facts, as established by the lower court's opinion, appearing as Hampton v. State, 21 Fla. L. Weekly D2114 (Fla. 1st DCA Sept. 24, 1996), are as follows:

> [t]he appellant challenges the denial of a Florida Rule of Criminal Procedure 3.850 motion for postconviction relief in which he asserted that he should not have been convicted of attempted felony murder, as State v. Gray, 654 So. 2d 552 (Fla. 1995), establishes that there is no such criminal offense in Florida. Although the appellant filed a prior motion under rule 3.850 raising a different claim, the supreme court's subsequent ruling in Gray could not then have been reasonably anticipated and the present motion thus does not constitute an abuse of the procedure as

> delineated in rule 3.850(f). And while the opinion in Gray recites that the decision must be applied to all cases pending on direct review or not yet final, this does not necessarily preclude application of the decision in cases where collateral relief is sought under rule 3.850. Recognizing that a conviction and sentence should not be imposed for a purported offense which does not exist, the third district ruled in Woodley v. State, 673 So. 2d 127 (Fla. 3d DCA 1996), that the decision in Gray will apply in connection with a rule 3.850 motion for postconviction relief. See also Brown v. State, 21 Fla. L. Weekly D1318 (Fla. 3d DCA June 5, 1996). Following Woodley, we concluded that the decision in Gray may thus apply in the present case. The challenged order is therefore reversed and the case is remanded.

The Petitioner thereafter sought and obtained review of the issue presented, which is identical to that before the Court in State v. Woodley, case no. 88,116, and other similar cases.

SUMMARY OF ARGUMENT

ISSUE I.

The change of law announced in State v. Gray, 654 So. 2d 552 (Fla. 1995) is not one of constitutional dimension so as to warrant retroactive application. Furthermore, the reliance of the old rule has been extensive, retroactive application of the new rule would be catastrophic upon the administration of justice, and retroactive application would not cure any individual injustice or unfairness to the Petitioner where the statute was deemed valid by this Court both at the time of his trial and his direct appeal.

ARGUMENT

ISSUE I

WHETHER THE HOLDING IN STATE V. GRAY, 654 SO. 2D 552 (FLA. 1995), WHICH HELD THAT ATTEMPTED FELONY MURDER WOULD NO LONGER BE RECOGNIZED AS A CRIME IN THE STATE OF FLORIDA, MUST BE APPLIED RETROACTIVELY IN POSTCONVICTION PROCEEDINGS?

In the instant case, the lower court, in reliance upon Woodley v. State, 673 So. 2d 127 (Fla. 3d DCA 1996), held that this Court's decision in State v. Gray, 654 So. 2d 552 (Fla. 1995), required retroactive application in postconviction proceedings. The court's reliance on Woodley, however, is misplaced and the conclusion reached in that case is contrary to established principles of law.

The lower court's opinion expressly states that the decision follows that of the Third District Court of Appeal in Woodley in which that Court addressed the question of whether the decision in Gray applied retroactively to cases which had already become final. In its ruling below, the First District Court ignored the fact that the Third District Court had receded from its position in Woodley, by denying similar relief in Miller v. State, 678 So. 2d 465 (Fla. 3d DCA 1996). The Miller Court noted that it was a "dubious assumption" to believe that Woodley had survived this

Court's decision in State v. Wilson, 21 Fla. L. Weekly S292 (Fla. July 3, 1996) wherein the Court recognized that a defendant whose attempted felony murder conviction was vacated could properly be tried and convicted of lesser included offenses because the crime of attempted felony murder only became "nonexistent" as a result of this Court's decision in Gray. Both the Third District Court in Miller and the Fifth District Court in Motes v. State, 21 Fla. L. Weekly D2644 (Fla. 5th DCA December 13, 1996), found that the language in Wilson shed serious doubt on the retroactive application of Gray to cases which were already final. Thus, the legal basis upon which the lower court justified its decision, i.e., the Woodley decision, is no longer recognized as valid by the court that decided it. Additionally, Woodley is currently pending before this Court in case number 88,116 on the identical issue presented here.

In determining whether a defendant is entitled to postconviction application of the rule of law announced in Gray, examination of the Court's expressed intent is essential. The Gray Court expressly stated that "[t]his decision must be applied to all cases pending on direct review or not yet final." 552 So. 2d at 554. Thus, the Court clearly chose to apply its decisions to cases which were not yet final, specifically excluding

application of the rule of law to those cases which were final. Clearly, this Court did not intend to authorize retroactive application of its decision to postconviction cases.

The Court's determination that the rule of law announced in Gray should be given application only to those cases which are not final is fully in accord with the principles enunciated in Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 612 (1980), which control the determination of whether a change in the law requires retroactive application. State v. Callaway, 658 So. 2d 983 (Fla. 1995); State v. Glenn, 558 So. 2d 4 (Fla. 1990); McCuiston v. State, 534 So. 2d 1144 (Fla. 1988).

Witt specifically recognized that postconviction proceedings played a very limited role, even in death cases where it has repeatedly noted that 'death is different.' Gregg v. Georgia, 428 U.S. 153, 188, 96 S. Ct. 2909, 2932, 49 L. Ed. 2d 859 (1976); State v. Dixon, 283 So. 2d 1, 17 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974); Swafford v. State, 679 So. 2d 736 (Fla. 1996).

The Witt Court held that only major constitutional changes of law emanating from either the United States Supreme Court or the Florida Supreme Court which constitute a development of

fundamental significance are cognizable under a motion for postconviction relief. Here, of course, the new rule announced in Gray originated from this Court.

The Witt Court further noted that such "jurisprudential upheavals" of constitutional dimension which warrant retroactive application in postconviction proceedings fall within two broad categories: cases which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties such as Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977) (holding that the death penalty could not appropriately be applied to rape cases), and those cases which are of such significant magnitude as to necessitate retroactive application as determined by the three part test enunciated in Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed.2d 1199 (1967) and Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965) such as the case of Gideon v. Wainwright, 372 U.S. 584, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (holding that states must provide adequate counsel for indigent criminal defendants in felony cases).

Application of these standards to the instant case reveals that the rule announced in Gray does not require retroactive application in postconviction proceedings to cases which were

final at the time the decision in Gray was rendered. Gray does not place beyond the power of the State the ability to charge or obtain convictions and sentences for attempted murder, since clearly, it may continue to charge attempted first degree premeditated murder. Instead, Gray merely precludes the State from charging or obtaining convictions for attempted felony murder. Thompson v. State, 667 So. 2d 470 (Fla. 3d DCA 1996) (conviction for attempted felony murder reversed and cause remanded for retrial on charge of attempted premeditated murder where the evidence supported the charge).

The decision in Gray is merely a clarification of the law as it relates to the element of intent, a factual issue. This change in the law is comparable to a evolutionary refinement in the law or a change in procedure which establishes new standards for the admissibility of evidence or procedural fairness. It does not rise to the level of a fundamental constitutional change in the law and thus does not satisfy this prong of the analysis. This is particularly true where, as here, the offense of attempted felony murder was expressly upheld as a constitutionally valid offense by this Court in Amlotte v. State, 456 So. 2d 488 (Fla. 1984) and continued to be recognized as such until the Gray decision some eleven years later. The

Florida Constitution specifically provides that even in those cases in which the Legislature repeals what was formerly recognized as a valid criminal statute, that action does not affect either prosecution or punishment of a previously committed crime. Article X, Sec. IX, Florida Constitution. See also: Skinner v. State, 383 So. 2d 767 (Fla. 3d DCA 1980). By analogy, to the Legislative repeal of a formerly valid statute, the Court's refinement of the law as to an element of the crime in Gray should not effect convictions and sentences which were previously imposed.

This assertion is fully supported by the Court's decision in State v. Wilson, supra, in which it remanded the cause for retrial on any other offense for which the jury received instruction at the original trial. The Court stated:

> [w]e have previously considered nonexistent offenses in slightly different circumstances...
> Wilson is correct in his assertion that those cases involved nonexistent offenses which were lesser included offenses of the principle charge in the charging document, as opposed to the instant case, where the principle charge was a nonexistent offense. However, we do not agree that this mandates dismissal of the charges in the instant case. In the earlier cases, "nonexistent" had a slightly different connotation. There, the offenses in question were never valid statutory offenses in Florida; they were simply the product of erroneous instruction. **Here, attempted felony murder was a statutorily defined offense, with enumerated elements and identifiable**

> **lesser offenses, for approximately eleven years. It only became "nonexistent" when we decided Gray. Because it was a valid offense before Gray, and because it had ascertainable lesser offenses, retrial on any lesser offense which was instructed on at trial is appropriate.**

Thus, as recognized by the Miller Court, its prior application of Gray to postconviction proceedings in Woodley was misplaced and shown to be incorrect based upon this Court's holding in Wilson.

Also of significance is the fact that the Legislature, in response to Gray, has in effect reinstated the offense of attempted felony murder by enacting F.S. 782.051, effective October 1, 1996, which provides that

> [a]ny person who perpetrates or attempts to perpetrate any felony enumerated in s. 782.04(3) and who commits, aids or abets an act that causes bodily injury to another commits a felony of the first degree, punishable by imprisonment for a term of years not exceeding life, or as provided in s. 775.082, s. 775.083 or s. 775.084, which is an offense ranked in level nine of the sentencing guidelines. Victim injury points shall be scored under this subsection.

The rule announced in Gray therefore may not properly be deemed one of constitutional dimension when the Legislature, in direct response to that decision, promptly enacted a statute designed to encompass the offense of attempted felony murder.

Application of the three part test of Stovall and Linkletter also establishes that the change in law announced in Gray does not merit retroactive application. That test provides that decisional finality should only be abridged in the face of a more compelling objective such as the goal of ensuring fairness or uniformity of decision in individual cases. Factors to be considered in the analysis are: 1) the purpose to be served by the new rule, 2) the extent of reliance upon the old rule, and 3) the effect of a retroactive application of the new rule on the administration of justice.

The purpose of the rule of law announced in Gray was to clarify internal inconsistency in the crime of attempted felony murder on the grounds that an attempt requires proof of specific intent whereas the doctrine of felony murder does not. The rationale asserted in support of the clarification was, however, directly opposite to that previously announced by the Court in Amlotte in which the Court stated "because the attempt occurs during the commission of a felony, the law, as under the felony murder doctrine, presumes the existence of the specific intent required to prove attempt." 456 So. 2d at 450. Gray reversed Amlotte holding that attempted felony murder was not a valid crime in this State. The change in law announced in Gray is

therefore decisional in nature and merely an evolutionary refinement which defines the parameters of attempt and felony murder for purposes of charging the crime.

The second element of Stovall, reliance upon the old rule of law, weighs heavily against retroactive application of the new rule. This Court's recognition in Amlotte that the offense was constitutionally sound has led to eleven years of reliance on that decision by the courts, prosecuting authorities, and public defenders of this State. The extent of that reliance is immeasurable and extensive. Moreover, the Legislature's enactment of a law which effectively reinstates attempted felony murder as a valid crime in this State indicates that the criminal justice system will continue to rely upon the crime for purposes of prosecution.

Retroactive application of Gray to final convictions would have disastrous effects upon the administration of justice as it would open the floodgates to potentially thousands of challenges to plea bargains which were previously found valid, as well as, all other cases in which a conviction for attempted felony murder was obtained, regardless of the charging documents involved.

Retroactive application of Gray is also not necessitated by principles of fairness and uniformity of individual decisions,

since the State would have the opportunity to retry the defendant on any lesser included offense for which the jury received instruction at trial or upon attempted premeditated murder where the evidence and charging documents permit. Thus, the last consideration of Stovall also remains unmet in the instant case.

As recognized by this Court in State v. Glenn,

> [t]he importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow the effective appellate review of other cases. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness of the criminal justice system as a whole.
>
> Therefore, the doctrine of finality should be abridged only when a more compelling objective... is present. In practice, because of the strong concern for decisional finality, this Court rarely finds a change in decisional law to require retroactive application. See *State v. Washington*, 453 So. 2d 389 (Fla. 1984). Accord *McCuiston v. State*, 534 So. 2d 1144 (Fla. 1988) (declined to retroactively apply *Whitehead v. State*, 498 So. 2d 863 (Fla. 1986), which held that finding a defendant to be an habitual offender is not a legally sufficient reasons for departure from sentencing guidelines); *Jones v. State*, 528 So. 2d 1171 (Fla. 1988) (declined to retroactively apply *Haliburton v. State*, 514 So. 2d 1088 (Fla. 1987), which held that police failure to comply with attorney's telephonic request not to question a defendant further until that attorney could arrive was a violation of due process); *State v. Safford*, 484 So.

> 2d 1244 (Fla. 1986) (declined to retroactively apply *State v. Neil*, 457 So. 2d 481 (Fla. 1984), which changed the long-standing rule in Florida that a party could not be required to explain the reasons for exercising peremptory challenges); *State v. Statewright*, 300 So. 2d 674 (Fla. 1974) (declined to retroactively apply *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), which established that police must warn arrested persons of their right to remain silent before questioning those persons).

558 So. 2d at 7.

The Glenn Court refused to retroactively apply a change of law to Glen based upon the strong impact such application would have upon the administration of justice which weighed heavily against the goal of ensuring fairness and uniformity in individual decisions, since separate convictions were proper both at the time of the trial and his subsequent direct appeal. Here, the same factor, the overwhelming impact on the judicial system, weighs heavily against the goals of ensuring fairness and uniformity since, as in Glenn, the statute was recognized as constitutionally valid at the time of the Petitioner's trial and direct appeal.

Based upon the foregoing argument, which establishes that the change in law announced in Gray was not of constitutional dimension, and which also establishes the judicial system's extensive reliance on the old law, the serious negative impact on

the administration of justice should the new law be applied retroactively, and the lack of a cure to any individual injustice or unfairness to the defendant should the rule be retroactively applied to him, the State respectfully requests the Court to decline to retroactively apply its holding in Gray to individuals, including the Petitioner, in postconviction proceedings.

CONCLUSION

Based on the foregoing, the State respectfully submits that this Court should decline to retroactively apply the rule announced in Gray to individuals, such as the Petitioner, in postconviction proceedings.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

GISELLE LYLEN RIVERA
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0508012

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER
[AGO# L96-1-6440]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS has been furnished by U.S. Mail to Allen Hampton, Pro Se Respondent, DOC # 298053, Box 269, Cross City Correctional Institution, P.O. Box 1500, Cross City, Florida, 32628, this 19th day of February, 1997.

Giselle Lyven Rivera

Giselle Lyven Rivera
Assistant Attorney General

[C:\USERS\CRIMINAL\GISELLE\HAMPTOBI.WPD --- 2/19/97,1:58 pm]

Appendix

96-110581 ICVC

RECEIVED
96 SEP 25 AM 8:33
[illegible] LEGAL SERVICES

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

ALLEN HAMPTON,

Appellant,

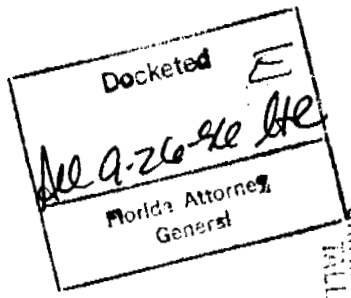
v.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. 96-809



Opinion filed September 24, 1996.

An appeal from Circuit Court for Duval County.
Hugh A. Carithers, Judge.

Allen Hampton, Cross City, Pro Se.

Robert A. Butterworth, Attorney General, and Giselle Lylen Rivera, Assistant Attorney General, Tallahassee, for Appellee.

ALLEN, J.

The appellant challenges the denial of a Florida Rule of Criminal Procedure 3.850 motion for postconviction relief in which he asserted that he should not have been convicted of attempted felony murder, as State v. Gray, 654 So. 2d 552 (Fla. 1995), establishes that there is no such criminal offense in Florida. Although the appellant had filed a prior motion under rule 3.850 raising a different claim, the supreme court's subsequent ruling in Gray could not then have been reasonably anticipated and the

present motion thus does not constitute an abuse of the procedure as delineated in rule 3.850(f). And while the opinion in Gray recites that the decision must be applied to all cases pending on direct review or not yet final, this does not necessarily preclude application of the decision in cases where collateral relief is sought under rule 3.850. Recognizing that a conviction and sentence should not be imposed for a purported offense which does not exist, the third district ruled in Woodley v. State, 673 So. 2d 127 (Fla. 3rd DCA 1996), that the decision in Gray will apply in connection with a rule 3.850 motion for postconviction relief. See also Brown v. State, 21 Fla. L. Weekly D1318 (Fla. 3d DCA June 5, 1996). Following Woodley, we conclude that the decision in Gray may thus apply in the present case. The challenged order is therefore reversed and the case is remanded.

MINER and MICKLE, JJ., CONCUR.